Internal Revenue Service
SB/SE Compliance
BIRSC, SS-8 Unit

Department of the Treasury
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Person to Contact:

Telephone Number:

Fax Number:

Refer Reply to: Case # 66894

Dear :

The purpose of this letter is to respond to a request for a determination of employment status, for Federal employment tax purposes, concerning the work relationship between , referred to as "the firm" in the rest of this letter, and , referred to as "the worker" in the rest of this letter. It has come to our attention that the services were performed in 2006.

It is our usual practice in cases of this type to solicit information from both parties involved. We requested information from the firm concerning this work relationship. Because we received no reply, we are issuing this determination based on the information available to us. Any other conditions that were not known or furnished may change this determination.

DETERMINATION RESULT

We hold the worker to be an employee of the firm. In the rest of this letter, we will explain the facts, law, and rationale that form the basis for this finding.

DESCRIPTION OF WORK RELATIONSHIP

The firm's owner, , is a parent with children that engaged the worker as a nanny. The worker provided her services to the firm's owner in 2006 and received the Form 1099-MISC for these services.

Information submitted by the worker indicated the firm's owner instructed her to do all the tasks the job required. The firm's owner assigned the worker her assignments and if any problems or complaints arose, the worker was required to contact the firm's owner. The worker performed her services personally, working Monday through Friday and some Saturday, from 7:30 AM to 5:30 PM, at the firm's owner's home. The worker was required to assist the firm's owner's children, getting them ready for school and watch over an infant, feeding and changing diaper.

The firm's owner provided all the necessary materials, supplies, and equipment the worker needed to perform her job duties. The worker supplied her labor and transportation. The firm's owner compensated the worker, from the company funds, an hourly wage for her services. The worker did not assume any financial risk in the relationship and therefore could not realize a profit or incur a loss as a result of the relationship.

The worker stated the firm's owner made benefits available to the worker, such as vacation and holiday pay. The worker's services were a necessary part of the firm's owner's day to day living. Our research indicated the worker did not advertise her services, nor did she perform similar services for others. Both parties retained the right to terminate the relationship without incurring liability.

LAW

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law."

Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of

each factor varies depending on the occupation and the context in which the services are performed.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, co-adventurer, agent, or independent contractor must be disregarded.

There are significant dissimilarities between this case and Rev. Rul.77-279. In the ruled case, in scenario 2, the parents leave the child at the individual's home in the morning before going to work and call for the child in the evening upon returning from work. The parents rely upon the individual's judgment in caring for the child and issue no instructions other than relative to diet, health and rest, and occasionally relative to special foods, medicines, etc., that the child may require from time to time. The individual is told whom to contact in case of emergency. The individual personally determines the amount of attention the child requires, the types of meals to be served, and the manner in which to cope with any situation likely to arise in rendering child care services. The individual is free to perform household chores at any time during which the child does not require personal attention, such as, while the child is taking an afternoon nap. The individual receives a fixed weekly fee from the parents for these services. However, the individual is not held out to the public as engaging in day care work, and is not required to obtain a license for such work under state law. The revenue ruling holds the individual was not an employee of the parents for federal employment tax purposes.

A worker who is required to comply with another person’s instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. See Rev. Rul. 74-389, 1974-2 C.B. 330.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral controls, financial controls, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the

methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

TAX RAMIFICATIONS

In general, domestic services include services of a household nature in or about a private home performed by cooks, waiters, butlers, housekeepers, maids, valets, babysitters, janitors, laundresses, caretakers, handymen, gardeners, grooms, chauffeurs of family-use vehicles, and companions for convalescents, the elderly, or the disabled. A private home is a fixed place of abode of an individual or family.

Nurses' aides and other unlicensed individuals normally perform services that are expected of maids and servants. Such services include bathing the individual, combing his/her hair, reading to the individual, arranging bedding and clothing, and preparing meals. These services are also considered domestic services.

Remuneration paid for domestic services is not subject to Federal income tax withholding, unless both the employer and employee voluntarily agree to it. See Code section 3401(a)(3). The domestic employee may make a request for income tax withholding by completing Form W-4, "Employee's Withholding Allowance Certificate," and may also request advance payments of the earned income credit by completing Form W-5 if she is eligible. However, there are no similar exceptions for FICA and FUTA taxes.

Because the worker's services constitute domestic services, the employer is responsible for withholding the employee's share of the FICA tax if the worker was paid up to a specific income threshold amount in each particular year. The wage threshold for withholding FICA tax in a specific year may be found in that year's Publication 926, "Household Employer's Tax Guide."

Remuneration paid in any medium other than cash to an employee for domestic services in the private home of the employer, or for her personal wants and comforts,

and not in the course of the employer's trade or business is not subject to FICA (Code section 3121(a)(7)(A). Domestic service performed by your spouse or by your child (under age 21) is not treated as employment subject to FICA. With some exceptions, domestic service performed by your parent or by an individual under age 18 at any time during the year, will also not be treated as employment subject to FICA if it is not the principal occupation of such employee.

If you paid cash wages of $1000 or more for domestic services during any calendar quarter in the calendar year or the preceding calendar year, then those wages are subject to FUTA tax (Code sections 3306(a)(3) and 3306(c)(2). Generally, you can take a credit against the FUTA tax for a contribution paid into state unemployment funds, although this credit cannot exceed 5.4 percent of the first $7000 of wages.

The FUTA requirements are based on the total wages paid to all domestic employees, while the FICA wage threshold is based on the wages paid to each domestic employee. Therefore, an employer may be liable for FUTA tax, while not liable for FICA tax.

Domestic employers are required to satisfy their tax obligations by increasing their quarterly estimated tax payments or by increasing tax withholding from their own wages. This requirement was effective in 1998. Estimated tax penalties apply to underpayments attributable to these taxes.

Therefore, we conclude that as the employer of the worker, you are liable for FICA and FUTA taxes for the worker, subject to the preceding thresholds. If you choose to pay your employee's share of social security and Medicare taxes in lieu of withholding it from the employee's wages, the amount must be added to the employee's wages for income tax purposes. However, it is not included as social security, Medicare, or FUTA wages.

For further clarification of household employee issues, please see Publication 926, "Household Employer's Tax Guide."

This determination is based on the application of law to the information presented to us and/or discovered by us during the course of our investigation; however, we are not in a position to personally judge the validity of the information submitted. This ruling pertains to all workers performing services under the same or similar circumstances. It is binding on the taxpayer to whom it is addressed; however, Section 6110(k)(3) of the Code provides it may not be used or cited as precedent.

Internal Revenue Code section 7436 concerns reclassifications of worker status that occur during IRS examinations. As this determination is not related to an IRS audit, it does not constitute a notice of determination under the provisions of section 7436, nor is this an audit for purposes of entitling you to section 530 relief (further explained below) if you are not otherwise eligible for such relief.

OPTIONS AND ASSISTANCE

The SS-8 Program does not calculate your balance due and send you a bill. You are responsible for satisfying the employment tax reporting, filing, and payment obligations

that result from this determination, such as filing employment tax returns or adjusting previously filed employment tax returns. Your immediate handling of this correction and your prompt payment of the tax may reduce any related interest and penalties.

Section 530 of the 1978 Revenue Act established a safe haven from an employer's liability for employment taxes arising from an employment relationship. This relief may be available to employers who have misclassified workers if they meet certain criteria. This is explained more fully in the enclosed fact sheet. It is important to note that this office does not have the authority to grant section 530 relief in relation to this determination. Section 530 relief is officially considered and possibly granted by an auditor at the commencement of the examination process should IRS select your return for audit. The SS-8 determination process is not related to an examination of your returns. There is also no procedure available to you by which you can request an audit for the purpose of addressing your eligibility for section 530 relief. You should contact a tax professional if you need assistance with this matter.

If you are not eligible for section 530 relief, and the failure to pay the correct amount of employment tax was due to the misclassification of a worker's status, you must use the rates outlined in section 3509 of the Code to calculate your liability. They are as follows:

IRC Section 3509(a) rates

The rates under IRC section 3509(a) total 10.68% of the wages paid up to the Social Security wage base for such year and 3.24% of the wages paid in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding is 1.5 percent of the wages you paid to your employee.

- FICA Taxes - Your liability for the **employee's** share of the social security and Medicare taxes is 20 percent of the full rate (20% of 6.20%=1.24% of wages up to the Social Security wage base; 20% of 1.45%=.29% of the total wages, including wages in excess of the Social Security wage base).

- FICA Taxes- Your liability for the **employer's** share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

IRC Section 3509(b) rates

If you did not file required information returns (e.g., Form 1099-MISC) consistent with treating the worker as not being an employee, you must use the rates under IRC section 3509(b). They total 13.71% of the wages paid up to the Social Security wage base for such year and 5.03% of the wages paid in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding is 3 percent of the wages you paid to your employee.

- FICA Taxes - Your liability for the **employee's** share of the social security and Medicare taxes is 40 percent of the full rate (40% of 6.20%=2.48% of wages up to the Social Security wage base; 40% of 1.45%=.58% of the total wages, including wages in excess of the Social Security wage base).
- FICA Taxes - Your liability for the employer's share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

Section 3509(c) provides that these rates do not apply in cases of intentional disregard of the requirement to deduct and withhold the tax, nor do section 3509 rates apply to taxes due on wages paid in any period within the current calendar year.
If you deem that the firm meets the criteria for section 530 relief as outlined in the enclosure, you do not have to file/adjust your employment tax returns to reflect this determination. Also, you may choose to reclassify this class of worker to employee status in accordance with this determination for future periods without jeopardizing your ability to claim section 530 relief for past periods.

If you need further assistance in filing/adjusting your employment tax returns due to the reclassification of your worker, please call the IRS help line at 1-800-829-4933. Call 1-866-455-7438 for assistance in preparing or correcting Forms W-2, W-3, 1099, 1096, or other information returns. If you have any questions concerning this determination, please feel free to contact the person whose name and number are listed at the top of this letter. Please refer to your case number (66894) when contacting us about this case.

Sincerely,

Operations Manager

Enclosures: Section 530 Fact Sheet
Publication 926
Notice of IRS Compliance Expectations
Notice 441
Sanitized Determination Letter for Public Disclosure

*To order forms and publications, please call 1-800-TAX-FORM or visit us online at www.irs.gov/formspubs.

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